Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD EUGENE STANLEY,

Petitioner

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent

On Petition For Writ Of Certiorari
To The Colorado Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JOHN STODDARD KLAR
Counsel of Record
551 Cooks Road
Orleans, VT 05860

QUESTIONS PRESENTED FOR REVIEW

After being convicted of violating a Thornton, Colorado gun possession ordinance he deemed unconstitutional, and after an unsuccessful *pro se* appeal, Petitioner Richard Stanley demanded in written notices filed with those courts that the presiding judges overturn his conviction "on constitutional grounds" or there would be a "treason charge" which would "result in a Mutual Defense Pact Militia warrant" for the respective judges' arrests.

1) Was Petitioner's First Amendment right to free speech violated by jury instructions which permitted the criminalization of pure speech without requiring proof that the Petitioner possessed any intent to threaten violence?
2) Were Petitioner's due process and free speech rights violated by jury instructions which permitted the criminalization of pure speech by unconstitutionally excluding consideration of the political context of the Petitioner's communications, and which failed properly to define "true threats"?
3) Was there sufficient evidence to convict Petitioner, where the proscribed speech consisted solely of a threat to issue a warrant for arrest without any concomitant threats of physical violence?

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ARGUMENT

This Petition seeks review of the decision of the Supreme Court of Colorado (People v. Stanley, case no. 07SC575) denying certiorari (Appendix C), and of the opinion of the Colorado Court of Appeals (People v. Stanley, Court of Appeals Case No. 04CA2164) (Appendix A) affirming Petitioner Richard Eugene Stanley's felony criminal convictions of two counts of attempting to influence a public servant by threat of violence. Petitioner contends that the courts below violated his rights under the United States Constitution, Amendments I and XIV.

Colorado Revised Statutes, § 18-8-306 provides:

> Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property, with the intent thereby to alter or affect the public servant's decision, vote, opinion or action concerning any matter which is to be considered or performed by him or the agency or body of which he is a member, commits a class 4 felony.

Facts and Standard of Review

On September 7, 2002, Petitioner, then campaigning as a Libertarian candidate for the United States Senate, wore a loaded sidearm in public in Thornton, Colorado to protest his opposition to that city's ordinance prohibiting gun possession absent a city permit. Appearing *pro se* at his trial in Thornton Municipal Court (Judge Charles Rose presiding), Petitioner was convicted of violating the city's ordinance and sentenced to ninety days in prison. Petitioner's subsequent appeal (also *pro se*) of this decision to the Adams County District Court (Judge Donald W. Marshall, Jr. presiding) was denied. Pending the execution of Petitioner's sentence, the Colorado legislature passed a bill which restricted and/or voided city gun ordinances like the City of Thornton's, and which the defendant firmly believed rendered his conviction void.

After receiving a "Notice and Order" from the Colorado Courts for him to appear to serve the prison sentence imposed for his violation of the Thornton gun ordinance, Petitioner prepared and filed with the Thornton Municipal Court the following "Notice and Order" which echoed the language and form of the Court's Order for Petitioner's arrest:

> Notice and Order
>
> This NOTICE to Judge Charles Rose is in regard to Stanley's gun charge and arrest of openly carrying a weapon, in violation of Thornton Ordinance TRMC38-237. This ordinance violates Colorado Constitution Art. 2,

Sec. 3, by interfering with his natural, essential, and inalienable right to self defense, under the color of law, for the arrest, charge, and conviction against Rick Stanley. The signing of SB-25 on March 18, 2003, affirms Article 2, Sec. 3, of the State Constitution, and pre-empts this ordinance. Rick Stanley demands that Judge Charles Rose, overturn this conviction of Stanley on Constitutional grounds. Failure to do so will result in a treason charge against Charles Rose for failure to uphold the oath of office to defend the Constitutions, which this Court has a copy of, and Charles Rose swore to, as a "condition" of his office. This treason charge, will result in a Mutual Defense Pact Militia warrant for Charles Rose's arrest if the following conditions are not met:

1. Overturn the unconstitutional conviction of Rick Stanley for violation of TRMC 38-237 because TRMC 38-237 violates the constitutional rights of Rick Stanley, under guise of "color of law."
2. Return the $1,500.00 bond to Rick Stanley.
3. Return Rick Stanley's property which consists of 1 each Smith and Wesson 6 shot .357 pistol and 6 each .357 bullets.

This court is notified, once more, as Stanley gave Notice from the beginning of the proceeding against him, Thornton Municipal Court has "NO" jurisdiction over him in this

matter.

Accordingly, this ORDER is affirmed.

Rick Stanley

The next day, Petitioner caused a similar "Notice and Order" to be delivered to Judge Marshall at the Adams County District Court. Petitioner was charged with two counts of attempting to influence a public servant in violation of Colorado Statutes § 18-8-306.

After his conviction on both counts by jury trial, Petitioner was sentenced to two consecutive maximum terms of three years in prison. He appealed these convictions to the Colorado Court of Appeals, which affirmed by decision announced April 5, 2007 (Appendix A). Petitioner's timely-filed Appeal to the Colorado Supreme Court was denied on November 19, 2007 (Appendix C).

Petitioner by counsel raised a First Amendment objection to the charges via a pre-trial Motion to Dismiss, on the ground that § 18-8-306 was unconstitutionally overbroad as applied to Petitioner's "pleadings" because they constituted protected speech, and that Petitioner had not threatened violence but only the issuance of a warrant. Petitioner's Motion was denied following hearing, in which the Court erroneously concluded that Petitioner had in the foregoing "Notice and Order" threatened to *execute* an arrest warrant (Appendix B, p. XXXVIII).

Petitioner's timely-filed appeal of his convictions to the Colorado Court of Appeals specifically argued that Petitioner's "Notices" did not constitute a true threat, and that proof of a subjective intent to threaten was a required element of a true threat. The Colorado Court of Appeals, after a lengthy discussion of the First Amendment issues presented and the case law concerning the use of a subjective versus an objective intent standard to determine whether speech constitutes a true threat, affirmed the use of an objective standard. In discussing this Court's decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), the majority decision surveyed the apparent confusion in the various Circuits as to whether Black held that proof of a subjective intent was required when government criminalized pure speech, and concluded: "We are persuaded by the reasoning of the cases rejecting the subjective speaker standard....Black does not hold that subjective intent to threaten must be proved...." (Appendix A, pp. XII, XIV).

The Court concluded that the Colorado statute, which required the state to establish a specific intent "...to alter or affect the public servant's decision" insulated it from challenge under Black (Appendix A, p. VIII) Of Black's language that defined true threats to "...encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence...," the Court of Appeals stated "This formulation requires an intent "to communicate a serious expression of" a threat, not the specific intent that the language be perceived by others as threatening." (Appendix A, p. XIV). The Court affirmed

Petitioner's convictions.

The special concurrence of Colorado Appellate Judge Vogt took issue with the majority's interpretation of Black, and emphasized the importance of a finding of specific intent in order to obviate First Amendment concerns where plain speech is proscribed. Judge Vogt felt that Black "...requires a showing that defendant subjectively intended to make a threat in order for his conviction to pass constitutional muster." (Appendix A, p. XXIX).

At trial, Petitioner's counsel did not object to the jury instruction concerning the definition of "threat," but on appeal the Colorado Court of Appeals, noting the importance of the First Amendment issues raised, allowed this challenge under the "plain error" standard, and ruled that under that standard the instruction "considered in its entirety, is not erroneous." (Appendix A, p. XXIII)

Neither did Petitioner object at trial to the failure of the jury instructions to require the jury to consider the context of Petitioner's communications, which context in this case was overtly political. The prosecution, aided by this omission, sought to and did exclude Petitioner's efforts to adduce evidence of the political controversy surrounding his allegedly threatening communications, and the underlying arrests for gun possession which motivated the Petitioner's "Notices" to the judges.

Petitioner raised this objection on appeal, and again the Colorado Court of Appeals addressed the issue under the "plain error" standard. After discussing

the context requirement of Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) and other cases, the majority reviewed the record for those contextual factors which *supported conviction*, and determined that there was sufficient evidence to support Petitioner's conviction. (Appendix A, pp. XVII-XX). The Colorado Court of Appeals therefore did not address the issue raised in Petitioner's appeal: that the political context surrounding Petitioner's notices had been unconstitutionally excluded from consideration because of the faulty jury instructions.

Petitioner contends that his constitutional rights were compromised by the failure of the trial court to require a showing of subjective criminal intent in order to establish that a "true threat" had been made. Petitioner's rights were further compromised by the trial court's erroneous instruction as to the requisite elements of a "true threat," and because the jury was not properly instructed to consider the context of Petitioner's speech. Petitioner further alleges that there was insufficient evidence to convict him of the charged offense, under either an objective or subjective standard.

I. PETITIONER'S FIRST AMENDMENT RIGHTS WERE VIOLATED WHEN HIS PURE POLITICAL SPEECH WAS PROSCRIBED WITHOUT A DEMONSTRATION THAT HE INTENDED TO THREATEN VIOLENCE.

Reasons Relied on for Allowance of Writ

Following this Court's decision in Virginia v. Black, *supra*, several Circuit Courts continue to apply an objective standard despite Black's mandate that in order to protect constitutionally-protected speech, the government must prove that a "...speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*, at 359. Other Circuits have clearly held that Black required a subjective standard, or *mens rea*, in order to criminalize pure speech.

In this case, the Colorado Court of Appeals decided this pivotal question of Constitutional law in a way which glaringly conflicts with the plain language of this Court in Black. Thus this case addresses a division in federal Circuit Court decisions (Supreme Court Rule 10 (a)), as well as a state court decision which has decided an important issue of federal law "in a way that conflicts with relevant decisions of this Court." (Supreme Court Rule 10 (c)). The factual and legal record in this case presents an ideal opportunity to resolve jurisprudential confusion, and thereby provide America's Courts (and citizens) with a cohesive and understandable standard for defining what speech is protected, and what speech can be constitutionally proscribed.

The importance of the need for clarification in this extremely important area of Constitutional law is emphasized in the conclusion of a recent Law Review article which addressed the same issues presented herein:

> At this point, only two things seem clear. First, absent a stronger statement from the Court in support of a subjective standard, the objective intent approach will continue to reign supreme. This, unfortunately, means speech will continue to be chilled in the name of precedent and prosecutorial burden. Second, given the range of reactions to *Black*, the Court will have to revisit the meaning of true threats and the issue of intent. When it does, we can only hope it is more successful at clearly defining the doctrine than it has been in the past....

Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev, 1225, 1277 (2006).

All speech is protected by the First Amendment, unless the government establishes that it is constitutionally proscribable under the rulings of this Court. "True threats" are understandably excepted from protection, and the courts have sought to clarify the demarcation between non-violent, protected speech (which sometimes can be threatening), and speech which actually threatens violence and can be proscribed. This has not always been an easy task, for such a line is most likely to be crossed in the very areas of speech most worthy of protection in our Republic. At a time when America was experiencing emotional political division over the war in Vietnam, this Court observed that "[t]he language

of the political arena, like the language used in labor disputes, ...is often vituperative, abusive, and inexact." Watts, at 708. In reviewing the statute before it, the Watts Court invoked New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), recognizing "...a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Watts, at 708.

This Court has repeatedly recognized that speech critical of public officials is especially valid, and is to be expected. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988). That public officials must anticipate sharp criticism is an obvious corollary to the First Amendment's protection of "freedom of expression upon public questions." New York Times Co., at 270.

An additional reason to shelter such speech from government regulation is the very real possibility of official reprisal against those who voice strident opposition or criticism of those in positions of authority. "Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution." Watts, at 712 (Douglas, J concurring). *See also* Huminski v. Corsones, 396 F.3d 53 (2d Cir.2005) (citizen could not be barred from courtroom for threats against judge; barring suspected to be retaliatory for critical speech).

This concern was also voiced by the Court in reviewing whether selective government prohibitions within areas of totally proscribable speech are per-

missible:

> The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed....Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any "neutral" basis, so long as the nature of the content discrimination is such that *there is no realistic possibility that official suppression of ideas is afoot.*

R.A.V. v. St. Paul, 505 U.S. 377, at 386, 390 (1992) (*emphasis added*).

The case at bar is one in which there was indeed a realistic possibility of official suppression and retaliation: suppression of, and retaliation for, the vocal protestations of a virulent supporter of the right to bear arms; of an ardent Constitutionalist and Libertarian who had stood in three courtrooms and persisted repeatedly in engaging the Court in discussion of his views on the Second Amendment.

These concerns about the potential for official sanction have imbued many of this Court's Free Speech standards, including the requirement that context of communications be considered when weighing whether particular speech is criminal (*infra*, II B); that what constitutes a "true threat" must be narrowly and clearly defined so as to criminalize only actual threats of violence (*infra*, II A); and that the state must establish the subjective intent of the speaker in order to penalize his pure spoken words. Black, *supra*.

Petitioner Richard Stanley was convicted under a

statute applied unconstitutionally through jury instructions which violated all three of the foregoing protections, under circumstances where he never "threatened" anyone with actual physical harm, but only with constitutional accountability for violating his right to peaceably bear arms. In such an environment, this Court's concerns about the potential for official abuse have particular cogence.

In Black, this Court enunciated that a subjective standard is constitutionally mandated when weighing intent in cases where "true threats" are alleged. In Watts, the Court emphasized that these standards are designed to exclude from governmental proscription those controversial yet valued forms of expression which are intrinsic to the image of America as free and open – political hyperbole, scathing satire and parody, or inflammatory political rhetoric – and which may even advocate violence and still merit the full protection of the United States Constitution. Even cross-burning, a particularly virulent form of speech, has been repeatedly protected from proscription absent a demonstration of an intent to intimidate. Also, where (as here) controversial speech is directed at judges, politicians, or other public figures, especially close scrutiny must be paid to ensure that what is penalized is indeed speech unworthy of protection, and not merely sharp words of rebuke.

Indeed, this was one reason specifically cited by Black for requiring proof of subjective intent even for cross burning:

> The act of burning a cross may mean that a person is engaging in constitutionally pro-

> scribable intimidation. But that same act may mean only that the person is engaged in core political speech....As interpreted by the jury instruction, the [prima facie evidence] provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute – and potentially convict – somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

Black, at 365.

Black spelled out the standard to be employed to balance the state's legitimate interest in stemming intimidation against the First Amendment's vital protection of free speech:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals....Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Black, at 359, 360.

In the case at bar, the Colorado Court of Appeals ruled that Black did not require proof of the speaker's subjective intent to threaten, and that the trial court's use of an objective standard (1)

(1) In approving the use of an objective standard, the Colorado Court of Appeals also highlighted another area of confusion in the evolving area of intent in "true threat" cases. The Court

(to establish only an intent to *influence* a public official) to convict petitioner was therefore permissible. The Court of Appeals affirmed Petitioner's conviction without requiring the state to prove *any* intent to threaten, but only *an intent to influence a judge* (a constitutionally protected, non-criminal intent inherent also in this Writ).(2)

In sum, the Colorado Court of Appeals reasoned that the statute at issue required a specific intent "to alter or affect [a] public servant's decision," and that the record revealed that Petitioner possessed this intent. (Appendix A, p. VIII). To require that the defendant possess a specific intent to threaten

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embraced the standard of "...how a reasonable speaker would anticipate the statement would be perceived by those to whom it was communicated," (Appendix A, pp. XIV-XV); but the jury in Petitioner's case was instructed that ""Threat" means a statement or statements that are likely to induce a belief in a reasonable person that the stated act or actions of unlawful violence will be carried out." (Appendix A, p. XXI). The difference in these standards ("objective speaker" v. "objective listener") is that one is a standard of negligence (whether the speaker should reasonably have known better); the other a strict liability requirement (even "negligent" or reckless speech is criminalized). Thus, a strict liability standard was employed by the trial court, and the appellate court affirmed by approving a negligence standard *not* employed at Petitioner's trial. Mr. Stanley would have been shielded by much stronger constitutional safeguards had he burned a cross on each of the judge's lawns, for even the Colorado Court of Appeals would then have had difficulty eluding Black's clear language.

(2) In Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir.2004), the Court similarly misinterpreted Black to require only that "the threat must be intentionally or knowingly *communicated*...." *Id.*, at 616 (*emphasis in original*).

violence, the Court of Appeals stated, would require "*an additional showing of specific intent*" (Appendix A, p. IX; *emphasis added*). In order to accomplish this misinterpretation of Black, the Court of Appeals sought to distinguish that case as "merely" defining

> ..."intimidation," the type of true threat proscribed by the statute at issue in Black. We do not read Black as requiring a similar definition for all types of true threats. Here, §18-8-306 proscribes not intimidation, but attempting to influence a public servant by means of deceit, threat of violence, or economic reprisal.

(Appendix A, p. XV).

But this is a patently flawed analysis: Black clearly required proof of an intent to threaten in order for speech to be constitutionally proscribed. This was not some additional, but a foundational, element of intent required by Black for *any* government restriction on speech, and there is no logical distinction that can be made between intimidation and other forms of true threat.

The concurring opinion of Judge Vogt is more forthright:

> In my view, Virginia v. Black...requires a showing that defendant subjectively intended to make a threat in order for his conviction to pass constitutional muster. Under Black as I read it, speech may not be constitutionally punished simply because a reasonable person would understand it as a threat, if the speaker did not mean for the speech to be so

understood....
(Appendix A, p. XXIX)

The disagreement between the justices in the Colorado Court of Appeals in the instant case is understandable. The majority cites a number of state court and federal District Court decisions which it contends employed an objective standard subsequent to Black, and also cases in the Sixth, Ninth, and Fifth Circuits. One of the cases relied upon by the majority, United States v. D'Amario, 461 F. Supp. 2d 298 (D.N.J. 2006), recites that "...since Black, almost every Circuit to address the question of what constitutes a "true threat" has continued to apply an objective standard," and then cites allegedly supportive cases from the First, Second, Seventh, Eighth, and Eleventh Circuits; and after some analysis concludes also "...that the Third Circuit – in agreement with almost every other Circuit – requires the existence of a "true threat" to be determined under an objective standard." *Id.*, at 301, 302.

Meanwhile, the Ninth and Tenth Circuits have very clearly interpreted Black to require a subjective intent to threaten violence in order to criminalize pure speech. In a unanimous decision in United States v. Cassel, 408 F. 3d 622 (9th Cir. 2005), the Ninth Circuit addressed exactly the same First Amendment issue presented in Petitioner's case: a statute which "...punishes speech precisely because of the "intimidat[ing]" message it contains." *Id.*, at 627. Recognizing that such a statute must be analyzed as a content-based restriction on speech (*Id.*, at 627), the Ninth Circuit reviewed this Court's

"...very few cases addressing the threat exception." *Id.*, at 628. The Cassel Court highlighted its own pre-Black decisions which held, *inter alia*, that "the requirement of intent to intimidate serves to insulate [a] statute from unconstitutional application to protected speech." *Id.*, at 630, citing United States v. Gilbert, 813 F. 2d 1523 (9th Cir. 1987). But Cassel then turned to this Court's decision in Black as controlling on the issue of intent:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment....A natural reading of this language [in Black] embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.
> The [Black] Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another "prima facie evidence of an intent to intimidate."

Id., at 631 (*emphasis in original*).

Having decided that it was bound by this Court's decision in Black to require proof of an intent to threaten in order to constitutionally punish threats, the Ninth Circuit by footnote in Cassel referenced decisions in the First, Fifth, and Seventh Circuits decided post-Black which employed objective stan-

dards, and then observed:

> In any event, we cannot agree. The *Porter* court cited *Black* but did not discuss it; crucially, it provided no explanation of how the prima facie evidence provision in *Black* could offend the First Amendment if intent to intimidate were constitutionally irrelevant. Neither the Seventh Circuit in *Fuller* nor the First Circuit in *Nishnianidze* cited *Black* at all. In short, it appears that no other circuit has squarely addressed the question whether *Black* requires the government to prove the defendant's intent.

United States v. Cassel, 408 Fed. 3d 633-634, footnote 10.

Since Cassel, the Tenth Circuit has also stated that Black requires proof of a subjective intent to threaten. United States v. Magleby, 420 F.3d 1136 (10th Circuit, 2005). *See also*, Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev, 1225, 1277 (2006); Lauren Gilbert, *Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism*, 58 U. Miami L.Rev. 843, 883-84 (2004).(3) And the Ninth Circuit, in yet another detailed analysis of the appropriate intent standard, seemed to depart from its Cassel position (United States v. Romo, 408 F.3d 622 (9th Cir.2005)), *cert. denied*, (2006), and then in United States v. Stewart, 420 F.3d 1007 (2005) questioned whether "...Romo's con-

(3) Prior to this Court's holding in Black, some commentators asserted that the First Amendment requires proof of *mens rea* in order for the government to proscribe speech. *See, e.g.*, Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 J.L. & Pub. Pol'y 283, 317-18.

tinued use of the objective "true threat" definition is consistent with Black's subjective "true threat" definition."

The apparent confusion in the decisions of the Ninth Circuit led the D'Amario (*supra*) Court to wryly observe that "[t]he Third Circuit does not share the Ninth Circuit's apparent inability to determine what comprises a "true threat." *Id.*, at 302. The D'Amario opinion then relied on two Third Circuit decisions (United States v. Zavrel, 384 F. 3d 130, (2004); United States v. Robinson, 188 Fed.Appx. 97, 2006 WL 1976033 at *1 (2006)) and a District Court decision (United States v. Ellis, 2003 WL 22271671 at *4 (E.D.Pa. July 15, 2003)), all of which adopted an objective intent standard *after* Black, to support its approval of an objective (reasonable speaker) standard.

Currently at least three different standards are employed in the courts (subjective speaker; objective speaker; objective listener), and the possibility of a fourth (subjective absent a compelling state interest) has been suggested.(4) There is division in the Circuits which desperately begs for this Court's guidance on an extremely important constitutional issue, and the Colorado courts below decided an important federal question in a way that conflicts with relevant decisions of this Court. Review of this matter is therefore appropriate under Supreme Court

(4) The Ninth Circuit in Stewart, *supra*, observed in a footnote that a subjective intent to threaten or intimidate might not be required where "...the government demonstrated a compelling interest in applying the objective test." *Id.*, at 1018, citing Cassel, *infra*, at 633.

Rule 10 ((a) and (c)), and Petitioner has clearly preserved this issue for review jurisdictionally, at both the trial and appellate court levels.

This Court's requirement in Black that proof of a subjective intent to threaten is mandated to constitutionally proscribe pure speech was created to safeguard against situations like that faced by Petitioner. By requiring merely a showing that Petitioner intended to influence a judge, the trial and appellate courts allowed the same criminalization of political speech by presumption that this court struck down in Black. Black held that the naked act of burning a cross could not be used to presume an intent to intimidate, which would relieve the prosecution of its burden to demonstrate a *mens rea* where First Amendment freedoms are abridged: in the case at bar, the prosecution was permitted to convict Mr. Stanley without proof of any subjective intent to threaten, exactly as was prohibited by this Court in Black. Surely if implicitly-threatening conduct like cross-burning requires the constitutional safeguard of an intent requirement, so also does pure speech like that for which Richard Stanley is now serving six years as a convicted felon.

In most cases, it would be hard to imagine a situation where a person could subjectively possess no intention to threaten, and yet reasonable listeners would perceive a threat of violence. For this reason, there is little sacrifice of the government's legitimate interest in proscribing "true threats" by employing the subjective standard of Black. Richard Stanley's case demonstrates that this rare combination can and does happen, and that the subjective

intent standard is an imperative component of First Amendment protection.

Because it excluded the requirement of a showing of subjective intent, the trial court permitted jury instructions (discussed *infra*) which excluded contextual evidence which demonstrated the political nature of Petitioner's speech. Evidence of defendant's intent was limited to his intention to influence public servants: this foreclosed Petitioner from adducing crucial contextual evidence, such as the facts underlying his "Notices" (that he had been arrested for purposely challenging two ordinances which he vehemently believed violated his constitutional right to bear arms; that at the time of said arrest he was a Libertarian candidate for the U.S. Senate; the satirical nature of the "Notices"; the information that the Colorado Legislature had just passed legislation which Petitioner believed rendered the gun ordinances void, and that he had been penalized for standing up to the judges for all Americans' rights; etc.).

Almost all of this contextual evidence – which is quite similar qualitatively, and far exceeds quantitatively, the contextual evidence emphasized by the Watts decision (in which the defendant had been sentenced only to probation) – was excluded from consideration in Richard Stanley's trial because the objective standard unconstitutionally applied by the trial court made most of this evidence irrelevant to the issue at proof: whether the judges felt threatened.

To focus on these judges' perceptions to the exclu-

sion of the Petitioner's intent criminalized speech which was politically motivated and which Petitioner never dreamed would be regarded as anything but political hyperbole. The Colorado Court of Appeals held that sufficient Constitutional protection was afforded Petitioner by the requirement in this case that the Petitioner intended to influence public servants, and that there was not a "second" requirement of Black to demonstrate a subjective intent to threaten. This flies fully in the face of the plain language and clear reasoning of Black, which struck down a Virginia statute in part because of faulty jury instructions which created an impermissible prima facie presumption ("The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."" Black, at 349). In words which seem to foreshadow the precise issue in the case at bar, this Court in Black held that "[t]he prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit this shortcut." *Id.*, at 367.

Petitioner was prejudiced by the use of an objective intent standard from adducing evidence which might have reduced the tremendous probative weight no doubt afforded the testimony of two such highly-respected figures as Judges Rose and Marshall. The exclusion of the political context of his speech, and his political motives, imposed an unconstitutional hurdle on Petitioner which compromised his rights to free speech and due process. Closing the door to Richard Stanley's subjective intent also

closed the door to evidence which would have revealed bias in the sole witnesses whose testimony determined his future. The trial court record reveals that the prosecution here took full advantage of this deficiency, and excluded or interrupted most of Petitioner's efforts to adduce evidence of his political background, his history of verbal conflict with the two chief witnesses against him over his constitutional rights, the fact that he had two underlying convictions for gun possession which had led to the filing of his "Notice," and other evidence which might have led the jury to consider the judges' testimony in a very different light than was permitted by the restriction of Mr. Stanley's First Amendment freedoms.

The trial court deprived Petitioner of his Free Speech protections under the First Amendment to the United States Constitution when it employed an objective standard to harshly criminalize his pure speech, in clear conflict with this Court's opinion in Black. Certiorari is appropriate to redress the error below, and to clarify this Court's ruling in Black so that a clear and uniform standard is properly established.

II. THE TRIAL COURT ERRED IN PERMITTING JURY INSTRUCTIONS WHICH IMPROPERLY DEFINED "THREAT" AND WHICH DID NOT INSTRUCT OR PERMIT THE JURY TO CONSIDER THE CONTEXT OF PETITIONER'S SPEECH.

The trial court erred when it approved jury instructions which permitted Petitioner to be criminally sanctioned based on an incorrect definition of what constituted a constitutionally proscribable threat of violence, and which excluded from the jury's full consideration the context of the challenged speech. These errors permitted Petitioner to be imprisoned for exercising a pure form of speech, communicated to judges in a *pro se* representation, without a requirement that the alleged threat be established to be violent or imminent. A written letter to President Bush stating "Pull out of Iraq or a warrant will issue for your arrest for treason for violating the United States Constitution" would be obvious political hyperbole, but in this case it was *precisely and solely* such language, with no ancillary threats of physical violence, which resulted in a life-changing punishment of Richard Stanley. This was made possible by erroneous jury instructions which excluded the context of Mr. Stanley's speech, and which incorrectly defined what threats are constitutionally proscribable.

Counsel for Petitioner did not raise objection to the subject jury instructions at trial, but did so on appeal, at which time the Colorado Court of Appeals agreed that the issues raised were of sufficient con-

stitutional import to merit review under a plain error standard.

A. THE JURY INSTRUCTION PERMITTED THE PROSCRIPTION OF PROTECTED SPEECH BECAUSE IT FAILED PROPERLY TO DEFINE WHAT ACTIONS MAY CONSTITUTE A TRUE THREAT.

The decision of the Colorado Court of Appeals reveals the plain error which occurred in this case. The majority's opinion observes that "...the record reveals that defendant possessed the specific intent required by the plain language of § 18-8-306 ("with the intent...to alter or affect the public servant's decision") and defendant does not contend otherwise on appeal." (Appendix A, p. VIII). The Court incorrectly characterized Petitioner's argument as "...the First Amendment, as applied by the Supreme Court in Black, requires an additional showing of specific intent to secure a conviction under § 18-8-306; specifically, that the speaker must have subjectively intended to make a threat of violence." (Appendix A, p. IX). The failure of this decision to properly apply the subjective standard of Black is discussed *supra*, but an additional unconstitutional aspect of the jury instructions approved by the trial court was their misstatement of what constitutes a true threat: whether or not a subjective or objective standard is employed, a "true threat" entails a threat of violence, not an intent to influence a judge. So glaring is the illogic employed by the Court of Appeals, as to prompt recollection of the fears expressed by this and other courts of official sanction of free speech, recounted *supra*.

The Jury Instructions at issue recited the elements of the crime of Attempt to Influence a Public Servant as requiring an intent "to alter or affect the public servant's decision ...[and to] knowingly ... attempt ...to influence the public servant ...by means of deceit, or by threat of violence." (Appendix A, pp. XX-XXI). "Threat" is then defined in Instruction 11 as

> ...a statement or statements that are likely to induce a belief in a reasonable person that the stated act or actions of unlawful violence will be carried out. A threat of violence is not protected under the free speech provisions of the Colorado or Federal Constitutions, nor under the constitutional provisions regarding the right to petition the government for redress of grievances. Words used as mere political argument, or even as idle talk or in jest, even if made in a very crude or offensive manner, do not constitute a threat.

(Appendix A, pp. XXI-XXII).

Especially where a trial court has so limited the required intent (to an intent merely to "influence a judge") and excluded evidence disproving any subjective "intent to threaten," it becomes crucial to due process that "unlawful violence" and "threat of violence" are properly defined in accordance with law. The trial court's tautological definition basically instructed the jury that a "true threat" was any threat of "unlawful violence." This instruction, by not defining what constituted "unlawful violence," and which did not instruct or permit the jury to weigh context (discussed *infra*), or imminence, was on its face violative of Petitioner's due process rights. Only

by the employment of such deficient instructions could the trial and appellate courts in this matter convict and imprison a man for six years solely for threatening to "issue a warrant for arrest." Petitioner *never threatened to arrest anyone*, and he never alleged that he or anyone else would execute the "warrant." Yet the trial court specifically concluded at pre-trial that a threat to arrest had been made sufficient to prosecute the case:

> The allegation that the Defendant attempted to influence the Judges by means of deceit really involves the representation that the militia warrant would be executed,(5) and that's arguably a form of deceit, and the letters represent the threat of violence in that the threat of forcible arrest and custody would actually take place and be carried out if the conviction was not overturned.(6) Now enforceable arrest obviously involves violence(7) in that it involves taking one into custody by force if necessary and it comes within the ambit of the statutory element of, "Threat of violence."....

Pre-trial transcript, Quinn, J. (Appendix B, p. XXXVIII).

The jury instructions comprised a vague and unconstitutional misstatement of the law, and permitted an inference of a threat of violence (a threat of

(5) Petitioner *never* made any such representation.

(6) Again, Petitioner never threatened that an arrest would take place, but only that a warrant would issue: all else was implied by the Courts below, and not explained to the jury.

(7) This has never been disputed by Petitioner, but Petitioner never threatened to arrest anyone – only to issue a symbolic writ – and he never made any threats of physical harm or violence against anyone.

death at that!) from a threat solely to issue a document.

Another leap was taken (as reflected in the Court of Appeals decision) when a threat to arrest for treason was interpreted (by the judges as a matter of law on appeal, not by the jurors as a factual finding) to be a threat of death (Petitioner's Notices "...also threaten a "charge" of treason, an offense punishable by death." (Appendix A, p. XIX)). Petitioner never threatened any physical harm, let alone of death; no one has been sentenced to death in America for treason since 1952 (Tomoya Kawakita); the Soviet Union does not even employ capital punishment for treason. (Criminal Code of Russia, § 275). Petitioner did not threaten to kill anyone for treason, or to arrest or execute anyone for treason. At *most* he threatened that a "treason charge" would be brought which would result in a *warrant* for arrest for treason. Yet the Court of Appeals found this to be a threat of death, and cited in support cases where defendants had specifically threatened physical acts of violence in conjunction with charging judges with treason.

The courts below never discuss why a threat to issue (not execute) a warrant for arrest is a threat of violence, let alone why a threat to issue a symbolic writ is violent. The vagueness of the instant jury instructions is revealed by the opaque reasoning of the Court of Appeals in affirming this conviction, and in the bizarre factual links fabricated in order to achieve this perverse and unconstitutional result.

As applied by the trial court and affirmed on appeal,

these instructions limited consideration of intent (objective or subjective) to the issue of Mr. Stanley's intent to influence the judges: beyond that, what constituted a threat of violence was left largely undefined. The patent deficiency of such instructions is shown by even a cursory review of the relevant case law.

A statute "...which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." Watts, at 707. It is this distinction which the trial court failed to make for the jury which convicted Petitioner.

In Black, this court struck down a cross-burning statute in part because of just such a faulty instruction: The trial court "...did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2-423." Black, at 351.

Citing Black, the Tenth Circuit in another cross-burning case expressed that
"[t]he threat must be made "with the intent of placing the victim in fear of *bodily harm or death*.""
United States v. Magleby, 420 F.3d 1136, 1139 (2005) (*emphasis added*). Exploring the case law regarding the issue of what constituted a threat, that Court opined:

> [In Lee,] The district court instructed that a threat could include "a variety of conduct intended to harm, frighten, punish, or inhibit the free action of other persons" and did not

> require "a threat of physical force or the intimidation of physical fear."...The *en banc* court reversed, holding that a threat was protected by the Constitution, and therefore could not be the basis of a criminal conviction, unless it was a threat of "the use of imminent force or violence."....
> Because one could threaten action other than *the use of force*, burning a cross to threaten is not the same as burning a cross to threaten the use of force; but the instructions conveyed that the former would suffice, and so did not accurately state the law.

Magleby, at 1140-1141 (citations to United States v. Lee, 6 F.3d 1297 (8th Cir.1993) omitted; *emphasis in original*).

In United States v.Cassel, 408 F.3d 622 (9th Cir. 2005), the Court found a jury instruction defective which defined intimidation to consist of words which ""would put an ordinary, reasonable person in fear or apprehension." Such claims, however, cannot constitute intimidation under § 1860, because they do not involve a threat of harm to person or property inflicted *by the defendant*." Cassel, at 637. (*emphasis in original*). The same deficiency inheres in the statute at bar (petitioner never threatened to issue the writ of arrest himself, any more than the defendant in Cassel had threatened witchcraft when he warned the victims in that case about witches and devil worshippers in the area). But additionally, the instruction, and thus the statute as applied to Petitioner, are patently deficient because they do not require a showing of any threat "of harm to person or property" (Cassel), or the threat

of "the use of force or violence" (Magleby), or any other constitutional guidance for the jury.

In the case at bar, the definition of a "true threat" merely as "unlawful violence" was all that was used in the jury instructions, and this definition was not sufficiently qualified or further defined by any other of the instructions. This permitted the conviction of petitioner without any requirement that there be any element of force, imminence, or physicality to his alleged threat. "Arrest" was not defined. The unlawfully violent implications of threatening to issue a "writ" or "treason charge" were not discussed. No cases convicting a human being in America for threatening the unlawful violence of "issuing a warrant for arrest for treason" have been cited. Had the judges below failed to protect Petitioner's Constitutional freedoms in knowing violation of their public oaths, they would have in fact been guilty of treason: but Petitioner would have been charged with a felony for saying so.

This contrasts sharply with comparable decisions involving constitutional convictions for pure speech threatening judges (e.g. United States v. Daughenbaugh, 49 F.3d 171 (5th Cir.1995) (letter to judge alleging treason and threatening, *inter alia*, that "I, the Aryan shadow of death, shall execute you in the most painful way....resign your government office now, if you do not wish to face treason charges & death...."); United States v. Schiefen, 139 F. 3d 638 (8th Cir.1998) (letter to judge charging treason stated "TREASON by law, is punishable by the DEATH PENALTY") and with statutes where the criminalized speech inherently contains a requi-

site threat of physical force or harm to person (e.g., United States v. D'Amario, 461 F.Supp.2d 298 (D.N.J. 2006) (statute criminalized threats to "assault, kidnap or murder" a United States judge); United States v. Stewart, 420 F.3d 1007 (9th Cir. 2005) (*ditto*; threat was "to string the motherfucker up and cut her throat").

The Colorado Court of Appeals directly addressed Petitioner's claim that "Instruction No. 11 incorrectly stated that a threat of violence is not protected by the First Amendment," and concluded that "the instruction, considered in its entirety, is not erroneous." The opinion then excused the lack of any instruction on what constituted unlawful violence as cured by the language in the same Instruction 11 which "...also stated in the next sentence that words "used as mere political argument, or as idle talk or in jest" are not threats. Thus, Instruction No. 11 properly distinguished between threats of violence that are true threats and those that are not." (Appendix A, pp. XXIII-XXIV).

This was clear error, for this definition did not prevent the jury from convicting Petitioner for words which did not threaten any act of physical violence, let alone imminent violence, regardless of whether or not they were political. Indeed, had petitioner's words been completely political, they would not be protected speech if they in fact threatened physical force or harm. What excepts true threats from the protections of the First Amendment is not that they are political, but that they threaten criminal action with intent to coerce or intimidate. Instruction 11 permitted the criminalization of pure speech with-

out a demonstration of any threat to cause physical harm or injury, and led to an impermissible conviction of Petitioner solely for a threat to "issue a writ for arrest" without any ancillary threats of violence not imputed to Petitioner by the Colorado Courts.

B. THE JURY INSTRUCTION PERMITTED THE PROSCRIPTION OF PROTECTED SPEECH BECAUSE IT IMPROPERLY EXCLUDED EVIDENCE OF CONTEXT.

The jury instructions at Petitioner's trial included no language whatsoever concerning consideration of the context in which Petitioner's statements were made. The jury was not instructed to consider context in determining whether the statements made were "mere political argument, etc.": on the contrary, much of the evidence of the context of Petitioner's speech was in fact systematically excluded from the jury's consideration. Moreover, the state was permitted thereby to present to the jury a context for Petitioner's statements which was factually erroneous and misleading.

On appeal, the Colorado Court of Appeals majority committed clear error of law as it examined Petitioner's challenge. It held that Petitioner's claims that the context of his statements revealed their political nature was "essentially...a challenge to the sufficiency of the evidence." But this ignores, in fact perverts, this Court's holding in Watts, where it em-

phasized that context must be evaluated to determine whether speech was political and thus protected. The Court of Appeals applied an opposite standard: whether there was sufficient contextual evidence to support conviction, ignoring whether political contextual evidence had been unconstitutionally excluded.

The Colorado Court of Appeals noted that it must consider context to determine whether a statement constituted a true threat, and then concluded "that a reasonable juror could find, based on the evidence submitted, and consistent with the First Amendment, that the Notices contained true threats, whether viewed from the perspective of a reasonable speaker or a reasonable recipient." (Appendix A, p. XVIII). But Watts clearly requires more, as "[the Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context." Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F. 3d 1058 (9th Cir.2002). The Court of Appeals in Petitioner Stanley's case did the opposite: instead of examining and reviewing those contextual factors which were political, the Court parsed through the record to collect those contextual facts which it deemed supported conviction. This ignored Petitioner's complaint that the jury was denied evidence of political context, and therefore avoided a discussion of whether it was constitutional error for political contextual evidence to be excluded from the jury's consideration.

As this Court observed in striking down a conviction

for cross burning: "The prima facie evidence provision in this case *ignores all of the contextual factors that are necessary to decide* whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." Black, *Id.*, at 367 (*emphasis added*). The due process infringement caused by excluding evidence of political context occurs independently of whether a subjective or objective intent standard is employed, and is not cured by sufficient contrary contextual evidence which proves the victim was fearful, as was done by the Court of Appeals. The issue is not whether there was sufficient evidence to convict, but whether Petitioner had been afforded his constitutional right to due process where substantial contextual evidence of a political nature was excluded from the jury's consideration by faulty jury instructions.

The trial court committed plain error in permitting jury instructions which unconstitutionally curtailed Petitioner's ability to adduce potentially exculpatory political contextual evidence. The Court of Appeals' effort to undertake a contextual consideration at the appellate level did not cure the trail court's error, nor even address the core issue of Watts. As noted in Black, *supra*, where an instruction "ignores all the contextual factors that are necessary to decide" whether speech is proscribable, "The First Amendment does not permit such a shortcut."

III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT PETITIONER CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The review of the decision below is properly undertaken with a two-step analysis:

> First, we determine whether the verdict is supported by sufficient evidence *See* United States v. Hanna, 293 F.3d 1080, 1088 (9th Cir.2002). If sufficient evidence is found, we then review de novo "whether the facts as found by the jury establish the core constitutional fact, in this case, a "true threat." "

Stewart, at 1015.

The evidence at Petitioner's trial fell grossly short of that necessary to convict him for the crime charged. The record shows that the only threat Petitioner has ever been charged with making was a threat that a "treason charge" would result, and that this would in turn result in the *issuance of a warrant* for the judges' arrests. The courts below went to extraordinary lengths to impute a violent "true threat" to Petitioner, but there was absolutely no factual evidence to do so.

There was insufficient evidentiary support for a finding that a threat to issue a writ was a threat of an unlawful act of violence. There was insufficient evidentiary support for a finding that a threat to arrest (even if made) is a threat to cause unlawful violence constituting a "true threat." This factual defi-

ciency can not constitutionally be compensated for by the majority opinion in the Court of Appeals, which tried to cure this blatant defect in the proceedings below by referring to an arrest as "an act in which the prospect of physical violence is inherent." (Appendix A, p. XVIII). The case cited by the court below in support of this proposition is inapposite: determining whether arrest is "an act in which the prospect of physical violence is inherent" is the question which should have, with constitutional guidance, been presented to the jury. But this question was not presented, and no such findings were made. This "finding of fact" by the Court of Appeals does not cure the defects below: there was insufficient evidence presented at trial to convict Petitioner of the crime charged consistent with the First Amendment

There was also insufficient evidentiary support for a finding that a threat to charge someone with treason is a threat to kill or to employ physical or otherwise unlawful violence but the Court of Appeals sought to fill in this gap on behalf of the jury in its opinion. It is axiomatic that appellate courts may not make such novel findings, and are limited to a review of the record.

In sum, the factual proof of a true threat herein is "insufficient as a matter of law" United States v. Carrier, 672 F.2d 300, 306 (2d Cir.), *cert denied*, 457 U.S. 1139 (1982): there are insufficient facts as found by the jury to establish the "core constitutional fact" of a "true threat." Stewart, at 1015, (quoting United States v. Hanna, at 1088).

CONCLUSION

Petitioner has been unconstitutionally convicted of a crime for pure political speech. This result was made possible by jury instructions which departed from this Court's clear holding in Black that proof of a subjective intent to threaten is necessary for government to restrict pure speech. Also, the instructions failed to define what constituted a "true threat" of violence, and excluded consideration of the political context of Petitioner's speech. Petitioner has properly preserved these issues for this honorable Court's consideration.

WHEREFORE, Petitioner prays that this Court will give full consideration to the weighty constitutional issues raised herein.

Petitioner Richard Eugene Stanley

BY JOHN STODDARD KLAR
Counsel of Record
551 Cooks Road
Orleans, VT 05860
(802) 754-6075
jsk@kingcon.co

Appendix A

Opinion of the Colorado Court of Appeals

Colorado Court of Appeals – April 5, 2007
No. 04CA2164. *People v. Stanley.*
Adams County District Court Nos. 03CR2956 & 03CR2971

Honorable Joseph R. Quinn, Judge

The People of the State of Colorado,
Plaintiff-Appellee,
v.
Richard Eugene Stanley,
a/k/a Rick Eugene Stanley, Jr.,
Defendant-Appellant.

JUDGMENT AFFIRMED
Division V
Opinion by: JUDGE J. JONES
Carparelli, J., concurs
Vogt, J., specially concurs
Announced: April 5, 2007

John W. Suthers, Attorney General, Matthew D. Grove, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee
Haddon, Morgan, Mueller, Jordan, Mackey & Foreman, P.C., Norman R. Mueller, Rachel A. Bellis, Denver, Colorado, for Defendant-Appellant

Defendant, Richard Eugene Stanley, appeals his convictions for two counts of attempting to influence a public official, contending, among other things, that the statute he was convicted of violating, § 18-8-306, C.R.S. 2006, was applied to him in violation of his right to freedom of speech under the First Amendment to the United States Constitution. We disagree with defendant's constitutional argument, and affirm the judgment of conviction.

I. Background

On September 7, 2002, defendant was charged with violating City of Thornton Municipal Code § 38-237 by carrying a dangerous weapon –namely, a loaded .357 magnum handgun. Thornton Municipal Judge Charles Rose presided at defendant's trial. Defendant, representing himself, argued that § 38-237 is unconstitutional in that it infringed on his rights under the Colorado Constitution to defend himself and to bear arms. Judge Rose found defendant guilty after a bench trial, and sentenced defendant to serve ninety days in jail and to pay a $500 fine.

Defendant appealed his conviction to the Adams County District Court, again arguing that § 38-237 is unconstitutional.

Judge Donald W. Marshall, Jr. affirmed defendant's conviction. Defendant did not further appeal this conviction or sentence.

Defendant failed to appear on the date ordered to begin serving his sentence. Instead, defendant's secretary, at defendant's direction, hand-delivered a

document to the City of Thornton Municipal Court labeled, "Notice and Order." The "Notice and Order" stated:

> This NOTICE to Judge Charles Rose is in regard to Stanley's gun charge and arrest of openly carrying a weapon, in violation of Thornton Ordinance TRMC38-237. This ordinance violates Colorado Constitution Art. 2, Sec.3, by interfering with his natural, essential, and inalienable right to self defense, under the color of law, for the arrest, charge, and conviction against Rick Stanley. The signing of SB-25 on March 18, 2003, affirms Article 2, Sec. 3, of the State Constitution, and pre-empts this ordinance. Rick Stanley demands that Judge Charles Rose, overturn this conviction of Stanley on constitutional grounds. Failure to do so will result in a treason charge against Charles Rose for failure to uphold the oath of office to defend the Constitutions, which this Court has a copy of, and Charles Rose swore to, as a "condition" of his office. This treason charge, will result in a Mutual Defense Pact Militia warrant for Charles Rose's arrest if the following conditions are not met:
>
> 1. Overturn the unconstitutional conviction of Rick Stanley for violation of TRMC 38-237 because TRMC 38-237 violates the constitutional rights of Rick Stanley, under the guise of "color of law."
> 2. Return the $1,500.00 bond to Rick Stanley.
> 3. Return Rick Stanley's property which consists of 1 each Smith and Wesson 6 shot .357 pistol and 6 each .357 bullets.

> This court is notified, once more, as Stanley gave Notice from the beginning of the proceeding against him, Thornton Municipal Court has "NO" jurisdiction over him in this matter.
> Accordingly, this ORDER is affirmed.
> Rick Stanley

On the following day, defendant's secretary, again at defendant's direction, mailed a similar "Notice and Order" to Judge Marshall at the Adams County District Court and to the Adams County District Court.

Defendant was charged, in separate cases, with two counts of attempting to influence a public servant in violation of § 18-8-306, a class four felony. The two cases were subsequently consolidated.

Acting pursuant to § 18-1-100 1, C.R.S. 2006, the court issued protection orders against defendant for the benefit of Judge Rose and Judge Marshall, both of which defendant refused to accept. In addition, both Judge Rose and Judge Marshall were placed under police and SWAT team protection.

Prior to trial, defendant moved to dismiss the charges on the ground § 18-8-306 is unconstitutionally overbroad as applied in this case because the "Notices" constituted speech protected by the First Amendment. Following a hearing, the court denied that motion.

Senior Judge Joseph R. Quinn, a former Chief Justice of the Colorado Supreme Court, presided at de-

fendant's trial, at which defendant was represented by counsel. A jury found defendant guilty of both charges. Judge Quinn sentenced defendant to six years imprisonment in the Department of Corrections (three years for each offense, to run consecutively), plus three years of mandatory parole. Judge Quinn also assessed a total of $10,000 in fines ($5,000 for each offense), and ordered defendant to pay $8,249.64 in restitution.

II. Discussion

A. Section 18-8-306 is not Unconstitutionally Overbroad as Applied to Defendant's Statements

Defendant argues that his convictions must be reversed because the statements contained in the two "Notices" were protected by the Free Speech Clause of the First Amendment of the United States Constitution. Specifically, defendant argues that § 18-8-306 is unconstitutionally overbroad as applied in this case because his statements did not constitute "true threats." While we agree that the threats of violence prohibited by § 18-8-306 are limited to "true threats," as that term is properly understood in the First Amendment context, we disagree with defendant's contention that the People did not prove that his statements constituted true threats. Accordingly, we conclude that § 18-8-306 was not unconstitutionally applied to defendant.

1. Section 18-8-306

Section 18-8-306 provides:

> Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property, with the intent thereby to

> alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him or the agency or body of which he is a member, commits a class 4 felony.

"The critical elements of this offense are (1) an attempt to influence a public servant (2) by means of deceit or by threat of violence or economic reprisal (3) with the intent to alter or affect the public servant's decision or *action." People v. Norman,* 703 P.2d 1261, 1269 (Colo. 1985); *accord People v. Janousek,* 871 P.2d 1189, 1194 (Colo. 1994); *People v. Schupper,* 140 P.3d 293, 298 (Colo. App. 2006).

2. The "True Threat" Requirement

While the First Amendment protects the right to free speech, its protection is not absolute. *Virginia v. Black,* 538 U.S. 343, 358, 123 S.Ct. 1536, 1547, 155 L.Ed.2d 535 (2003). Some categories of speech are unprotected by the First Amendment, and the government may permissibly regulate speech that falls within these categories. *Black, supra,* 538 U.S. at 358, 123 S.Ct. at 1547; *People v. Hickman,* 988 P.2d 628, 638 (Colo. 1999). One such category is "true *threats." Black, supra,* 538 U.S. at 359, 123 S.Ct. at 1547-48; *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942) (identifying several types of statements that have "never been thought to raise any Constitutional problem"); *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 388, 112 S.Ct. 2538, 2546, 120 L.Ed.2d 305 (1992); *Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 (1969); *Janousek, supra,* 871 P.2d at 1193 (person

"has no constitutionally protected right to make threats of violence to a public servant").

The "true threat" requirement is generally regarded as having its origin in the Supreme Court's decision in *Watts, supra.* The defendant in that case was convicted of violating 18 U.S.C. § 871, which proscribes making a threat against the President. The conviction was based on the defendant's statement at a political rally against the Vietnam War that "[i]f they ever make me carry a rifle the first man I want to get in my sights is *L.B.J." Watts, supra,* 394 U.S. at 706, 89 S.Ct. at 1401. While the Court held that the statute was constitutional on its face, it also held that it must be interpreted to distinguish between "true threats," which may be proscribed, and "political hyperbole," which may not be. *Watts, supra,* 394 U.S. at 707-08, 89 S.Ct. at 1401. Because the Court determined that the statement, considered in context, could not be interpreted as other than political hyperbole, it reversed the defendant's conviction. *Watts, supra,* 394 U.S. at 708, 89 S.Ct. at 1402.

Since *Watts,* the Supreme Court has not definitively articulated the meaning of "true threats." In *Black, supra,* however, the Supreme Court said: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, *supra,* 538 U.S. at 359, 123 S.Ct. at 1548; *see also Janousek, supra,* 871 P.2d at 1198 (Mullarkey, J., specially concurring) ("A 'true threat' is a serious threat, as opposed to mere political argument, talk

or jest.. ..").

Any statute that criminalizes threats must, of course, be applied and interpreted consistently with the First Amendment. *Watts, supra,* 394 U.S. at 707, 89 S.Ct. at 1401; *Hickman, supra,* 988 P.2d at 639-41. Accordingly, we agree with the parties that § 18-8-306 must be interpreted to limit criminal culpability to statements constituting "true threats." See *Watts, supra,* 394 U.S. at 708, 89 S.Ct. at 1401; *Hickman, supra,* 988 P.2d at 639-41; *State v. Johnston,* 127 P.3d 707, 711-12 (Wash. 2006). Indeed, in *Janousek, supra,* our supreme court appears to have interpreted § 18-8-306 as so limited.

We turn, then, to defendant's principal contention: namely, that the Supreme Court in *Black* altered the true threat analysis so as to require proof that the maker of the threat subjectively intended to threaten, and that his conviction cannot stand because there was no evidence that he subjectively intended to threaten Judge Rose or Judge Marshall.

3. Intent

Defendant testified in the trial court that he sent the "Notices" with the intent of influencing Judge Rose and Judge Marshall to reverse his conviction for violating Thornton Municipal Code § 38-237. Thus, the record reveals that defendant possessed the specific intent required by the plain language of § 18-8-306 ("with the intent ...to alter or affect the public servant's decision"), and defendant does not contend otherwise on appeal.

Defendant nevertheless argues that the First

Amendment, as applied by the Supreme Court in *Black*, requires an additional showing of specific intent to secure a conviction under § 18-8-306; specifically, that the speaker must have subjectively intended to make a threat of unlawful violence. We are not persuaded.

Defendant's argument presents a question of law which we review de novo. *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 270-7 1 (Colo. 1997); *Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001).

Section 18-8-306 has been construed as criminalizing certain threats as viewed from an objective, reasonable person's perspective. *See Janousek, supra,* 871 P.2d at 1198 (Mullarkey, J., specially concurring) (threat evaluated by "whether those who hear or read the threat reasonably consider that an actual threat has been made"); *People v. McIntier,* 134 P.3d 467, 472 (Colo. App. 2005)(same). After *Watts,* and prior to *Black,* courts construing other criminal statutes proscribing certain types of threats almost uniformly applied an objective standard (from either the speaker's or the recipient's perspective) to determine whether a statement was a true threat. *See, e.g., People v. Baer,* 973 P.2d 1225, 1231, 1233 (Colo. 1999) (threat cognizable under § 18-9-111, criminalizing harassment by stalking, assessed under "an objective 'reasonable person' standard"); *United States v. Fulmer,* 108 F.3d 1486, 1490-91(1st Cir. 1997); *United States v. Aman,* 31 F.3d 550, 553-56 (7th Cir. 1994); *United States v. Malik,* 16 F.3d 45, 49 (2d Cir. 1994); *United States v. Kosma,* 951 F.2d 549, 556-57 (3d Cir. 1991); *United States v. Orozco-*

Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990). *But see United States v. Patillo,* 438 F.2d 13, 15 (4th Cir. 1971) (en banc) (in prosecution for threatening the President, the prosecution must prove a present intent to do injury if the threat is communicated to someone other than the President). *See generally* Note, *"True Threats" and the Issue of Intent,* 92 Va. L. Rev. 1225 (2006). Indeed, even prior to *Watts,* courts typically interpreted statutes proscribing threats as requiring proof that a reasonable person would perceive the statement as a threat. *See, e.g., Ragansky v. United States,* 253 F. 643, 644-45 (7th Cir. 1918).

In *Black,* the Supreme Court examined three defendants' convictions under a Virginia statute which made it unlawful for a person "with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public *place." Black, supra,* 538 U.S. at 348, 123 S.Ct. at 1541. The Court concluded that the statute was not constitutionally overbroad, but was unconstitutional insofar as it provided that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate," because the presumption would permit conviction for cross burnings that merely constituted political speech. In addressing the overbreadth question, the Court briefly discussed the concept of true threats:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.. ..The speaker need not actually intend to carry out the

> threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."

Black, supra, 538 U.S. at 359-60, 123 S.Ct. at 1548 (citations omitted) (quoting in part *R.A.V., supra,* 505 U.S. at 388, 112 S.Ct. at 2546). The Court then proceeded to define intimidation, the object proscribed by the statute at issue, as follows: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or *death." Black, supra,* 538 U.S. at 360, 123 S.Ct. at 1548.

Since *Black* was decided, only a few courts have directly addressed the argument that *Black* requires proof of the speaker's subjective intent to threaten. *Compare United States v. D'Amario,* 461 F. Supp. 2d 298, 301 (D.N.J. 2006) (no such proof required); *New York ex rel. Spitzer v. Cain,* 418 F. Supp. 2d 457, 478-79 (S.D.N.Y. 2006) (same); *United States v. Bly,* (W.D. Va. No. CRIM. 3:04CR0001 1, Oct. 14, 2005) (same); *United States v. Ellis,* (E.D. Pa. No. CR.02-687-1, July 15, 2003) (same); *and People v. Pilette,* (Mich. Ct. App. No. 266395, Nov. 21, 2006) (same), *with United States v. Cassel,* 408 F.3d 622, 63 1-33 (9th Cir. 2005) (such proof is required under 18 U.S.C. § 1860, which prohibits intimidating a person not to bid on or buy federal land). *See also United States v. Hankins,* 195 Fed. Appx. 295 (6th Cir. 2006) (not selected for publication) (citing *Black*

as support for the objective test); *United States v. Romo,* 413 F.3d 1044, 1051 & n.6 (9th Cir. 2005) (applying objective standard to statute proscribing threats against the President, and interpreting the holding in *Cassel* as inapplicable to such threats), *cert. denied,___U.S. ___,* 126 S.Ct. 1638, 164 L.Ed.2d 348 (2006); *Porter v. Ascension Parish School Bd.,* 393 F.3d 608, 616 & nn.25-27 (5th Cir. 2004) (continuing to apply objective test while acknowledging *Black's* definition of true threats), *cert. denied,* 544 U.S. 1062, 125 S.Ct. 2530, 161 L.Ed.2d 1112 (2005); *United States v. Carmichael,* 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004) (acknowledging the decision in *Black,* but concluding that "[t]he Supreme Court has not settled on a definition of a 'true threat'"); *Citizen Publ'g Co. v. Miller,* 115 P.3d 107, 114-15 (Ariz. 2005) (treating the "reasonable person" test applied in earlier cases as "substantially similar" to the test articulated in *Black); State v. DeLoreto,* 827 A.2d 671, 680 (Conn. 2003) (acknowledging *Black's* formulation of a true threat and applying objective test).

We are persuaded by the reasoning of the cases rejecting the subjective speaker standard.

Fundamentally, the reason threats of violence are not protected by the First Amendment is because they serve none of the purposes of the First Amendment: they do not express ideas or opinions, and are not part of the marketplace of ideas in which there is dialogue. *Shackelford v. Shirley,* 948 F.2d 935, 938 (5th Cir. 1991); *United States v. Velasquez,* 772 F.2d 1348, 1356-57 (7th Cir. 1985) (cited with approval in *Hickman, supra,* 988 P.2d at 638 n.7). The

First Amendment does not protect a statement that a reasonable speaker or a reasonable recipient would perceive as a threat of harm (as opposed to mere political hyperbole) on the basis that, notwithstanding the content of the statement, the speaker may not have intended the recipient to perceive a threat. Such a threat of violence is no more an idea, opinion, or part of a dialogue in the marketplace of ideas than if it had been made with such intent. The threat remains, in either event, devoid of content protected by the First Amendment.

Moreover, prohibitions against threats of violence serve the legitimate purpose of protecting the recipient of the statement "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will *occur." R.A.V., supra,* 505 U.S. at 388, 112 S.Ct. at 2546; *see also Black, supra,* 538 U.S. at 360, 123 S.Ct. at 1548; *Cain, supra,* 418 F. Supp. 2d at 479; *Hickman, supra,* 988 P.2d at 638.

This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists,* 290 F.3d 1058, 1076 (9th Cir. 2002) (en banc); *see also Kosma, supra,* 951 F.2d at 556-57; *D'Amario, supra,* 461 F. Supp. 2d at 301; *Cain, supra,* 418 F. Supp. 2d at 479 ("A standard for [true] threats that focused on the speaker's subjective intent to the exclusion of the effect of the statement

on the listener would be dangerously underinclusive with respect to the first two rationales for the exemption of threats from protected speech.").

Contrary to defendant's contention, *Black* does not hold that subjective intent to threaten must be proved. Defendant relies on two statements in *Black*. The first is the formulation of a true threat quoted above: "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, *supra*, 538 U.S. at 359, 123 S.Ct. at 1548. This formulation requires an intent "to communicate a serious expression of" a threat, not the specific intent that the language be perceived by others as threatening. *Cain, supra*, 418 F. Supp. 2d at 479; *People v. Pilette, supra; see also Fogel v. Grass Valley Police Dep't*, 415 F. Supp. 2d 1084, 1087 (E.D. Cal. 2006).

The second statement in *Black* on which defendant relies is the Court's definition of "intimidation" quoted above: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or *death." Black, supra*, 538 U.S. at 360, 123 S.Ct. at 1548. This statement, however, must be read in context of the Court's statement just three sentences earlier characterizing the relevant intent as an intent to communicate. Further, we do not read this statement as precluding a determination of the speaker's intent based on an objective standard –that is, how a rea-

sonable speaker would anticipate the statement would be perceived by those to whom it was communicated. Finally, the statement merely defines "intimidation," the type of true threat proscribed by the statute at issue in *Black*. We do not read *Black* as requiring a similar definition for all types of true threats. Here, § 18-8-306 proscribes not intimidation, but attempting to influence a public servant by means of deceit, threat of violence, or economic reprisal.

We acknowledge that reasonable persons can read *Black* differently. However, given that courts have, prior to *Black,* defined "true threat" in numerous contexts according to an objective standard, and have done so virtually unanimously, we think it highly unlikely the Supreme Court in *Black* intended to effectively overrule that vast body of precedent sub silentio.

In sum, we reject defendant's argument that the First Amendment required the People to prove that he subjectively intended to threaten Judge Rose and Judge Marshall.

4. No Privilege for Making Threats in Judicial Proceedings

Defendant also contends his statements are privileged –that is, he is immune from prosecution for the statements –because they were made "in pleadings filed by a *pro* se litigant attempting to forcefully, albeit belligerently, make his point." Again, we disagree.

This contention also presents a question of law sub-

ject to de novo review. *See NBC Subsidiary (KCNCTV), Inc. v. Living Will Center,* 879 P.2d 6, 11 (Colo. 1994) (whether defamatory language is constitutionally privileged is a question of law subject to de novo review).

True threats, "however communicated," are not protected by the First Amendment. *Hickman, supra,* 988 P.2d at 638 (quoting *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 773, 114 S.Ct. 2516, 2529, 129 L.Ed.2d 593 (1994)). Such threats are not entitled to heightened constitutional protection simply because they are made in the context of a pleading, or in any other public forum, as opposed to in a private setting, because, as noted, they do not further any of the purposes of the First Amendment. *See Shackelford, supra,* 948 F.2d at 938; *Velasquez, supra,* 772 F.2d at 1356-57.

The cases cited by defendant in support of this argument are inapposite. All of them concerned immunity from defamation liability. None involved prosecution for true threats. *See McDonald v. Lakewood Country Club,* 170 Colo. 355, 364, 461 P.2d 437, 442 (1969); *Renner v. Chilton,* 142 Colo. 454, 455-56, 351 P.2d 277, 277 (1960); *Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs.,* 712 P.2d 1024, 1027 (Colo. App. 1985). Defendant cites no case, and we have not found one, holding that a criminal defendant has a First Amendment privilege to threaten violence against a judge if he does so in the context of a court proceeding.

5. Sufficiency of the Evidence

Defendant also contends that the statements in his

"Notices," when viewed in context, were not "true threats." We disagree.

Essentially, this contention is a challenge to the sufficiency of the evidence. "When the sufficiency of the evidence is challenged on appeal, the reviewing court must determine whether any rational trier of fact might accept the evidence, taken as a whole and in the light most favorable to the prosecution, as sufficient to support a finding of guilt beyond a reasonable *doubt." McIntier, supra,* 134 P.3d at 471.

While the question whether a statement is a "true threat," as opposed to protected speech, is, in the first instance, one of fact to be determined by the fact finder, *see McIntier, supra,* 134 P.3d at 474; *Johnston, supra,* 127 P.3d at 712, where First Amendment concerns are implicated, we have an obligation to make an independent review of the record as a whole in order to assure that the judgment does not impermissibly intrude on the field of free expression. *See Bose Corp. v. Consumers Union, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984); *Lewis, supra,* 941 P.2d at 270-7 1; *DeLoreto, supra,* 827 A.2d at 679; *Johnston, supra,* 127 P.3d at 712.

In determining whether a statement constitutes a true threat, we first consider the plain import of the words used. *See Janousek, supra,* 871 P.2d at 1193, 1195 (noting the forceful language of the statement and the explicit and implicit threat expressed thereby); *McIntier, supra,* 134 P.3d at 472. We must also consider the context in which the statement was made. *McIntier, supra,* 134 P.3d at 472; *see*

Black, supra, 538 U.S. at 367, 123 S.Ct. at 1551; *Watts, supra,* 394 U.S. at 708, 89 S.Ct. at 1402; *Hickman, supra,* 988 P.2d at 639; *Janousek, supra,* 871 P.2d at 1198 (Mullarkey, J., specially concurring). Some of the contextual factors that may be considered include (1) to whom the statement is communicated; (2) the manner in which the statement is communicated; and (3) the subjective reaction of the person whom the statement concerns. *See R.A.V., supra,* 505 U.S. at 388, 112 S.Ct. at 2546; *Watts, supra,* 394 U.S. at 708, 89 S.Ct. at 1402; *Cain, supra,* 418 F. Supp. 2d at 475; *Janousek, supra,* 871 P.2d at 1194-95; *McIntier, supra,* 134 P.3d at 472; *Citizen Publ'g Co., supra,* 115 P.3d at 115.

We conclude that a reasonable juror could find, based on the evidence submitted, and consistent with the First Amendment, that the Notices contained true threats, whether viewed from the perspective of a reasonable speaker or a reasonable recipient.

Contrary to defendant's contention, the language in the Notices is not merely "a prediction of political theater" or "metaphorical." See *Watts, supra,* 394 U.S. at 706-08, 89 S.Ct. at 1401-02 (threats of violence that are merely "political hyperbole" are protected speech); *Hickman, supra,* 988 P.2d at 639 (same). Rather, the Notices expressly threatened the judges with "arrest" by a "Mutual Defense Pact Militia," an act in which the prospect of physical violence is inherent. Cf. *Malik, supra,* 16 F.3d at 49-50 (threat of armed robbery unless judges reversed decisions was, together with other statements, a

true threat). They also threaten a "charge" of treason, an offense punishable by death. Cf. *United States v. Schiefen,* 139 F.3d 638 (8th Cir. 1998) (upholding conviction for threatening a federal judge where letter defendant mailed to judge stated that the punishment for treason is death); *United States v. Daughenbaugh,* 49 F.3d 171, 173-74 (5th Cir. 1995) (letters to judges threatening treason charges and death sufficient to support convictions for mailing threatening statements); *see also* 18 U.S.C. § 2381 (treason is punishable by death). The Notice to Judge Rose was filed in the case in which Judge Rose had presided, and the Notice to Judge Marshall was mailed to the judge. Thus, the threats were conveyed directly to the persons threatened; defendant did not merely communicate them to a stranger to his court proceedings. *See McIntier, supra,* 134 P.3d at 472.

Moreover, both judges felt threatened by the Notices. Judge Rose testified that he was afraid for his life as a result of defendant's "Notice." Judge Marshall testified that he was alarmed by the "Notice" and perceived the document as a direct and immediate threat to his personal safety. The subjective reactions of the persons to whom the Notices were directed support (but do not compel) the conclusion that statements therein were true threats. *United States v. Alaboud,* 347 F.3d 1293, 1298 (11th Cir. 2003); *Fulmer, supra,* 108 F.3d at 1499-500.

We reject defendant's contention that his statements necessarily constituted mere "criticism" of the judges. Defendant cites *In re Green,* 11 P.3d 1078 (Colo. 2000), for the proposition that criticism

of judges is protected speech. *In re Green* is inapposite, however. A merely critical remark and a threat of violence (if a true threat) are substantially different in a constitutionally meaningful way. A statement of critical opinion about a judge is protected (assuming it does not imply a false statement of fact) because it serves the principal purpose of the First Amendment –to safeguard public discussion of governmental affairs. *In re Green, supra,* 11 P.3d at 1084-85. A threat of violence against a judge, on the other hand, is not an expression of an idea or opinion, or part of a public dialogue in the marketplace of ideas. The statements at issue here threaten violence.

In sum, we conclude that the evidence is sufficient to support defendant's convictions.

B. The Jury Instructions Were Not Erroneous

Defendant contends that the jury instructions setting forth the elements of the offense and defining a threat were constitutionally deficient because they (1) incorrectly stated that a "threat of violence" is not protected by the First Amendment; (2) failed to include the "new" element of the speaker's subjective intent to threaten; and (3) established a conclusive presumption that the statements in the Notices were not true threats. We disagree with all three contentions.

1. Instructions Nos. 10 and 11

Instruction No. 10 stated:

> The elements of the crime of Attempt to Influence a Public Servant are:
>
> 1. That the defendant,
>
> 2. in the State of Colorado, at or about

the date and place charged,
3. with intent to alter or affect the public servant's decision, vote, opinion or action,
4. concerning any matter which is to be considered or performed by the public servant,
5. knowingly,
a. attempts to influence the public servant,
b. by means of deceit, or by threat of violence.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Attempt to Influence a Public Servant.
After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Attempt to Influence a Public Servant.

Instruction No. 11 defined "threat" as follows:

"Threat" means a statement or statements that are likely to induce a belief in a reasonable person that the stated act or actions of unlawful violence will be carried out. The speaker or author need not intend to carry out the threat. A threat of violence is not protected under the free speech provisions of the Colorado or Federal Constitutions, nor under the constitutional provisions regarding the right to petition the government for redress of grievances. Words used as mere political argument, or as idle talk or in jest, even if made in a very crude or offensive manner, do not

constitute a threat.

2. Standard of Review

We agree with the parties that because defendant failed to object to these particular jury instructions at trial, defendant's contention of error with respect thereto is reviewable only for plain error. Crim. P. 30, 52(b); *People v. Miller,* 113 P.3d 743, 749, 751 (Colo.), *cert. denied,___U.S.* ___, 126 S.Ct. 663, 163 L.Ed.2d 536 (2005); *People v.* Grant,___P.3d___,___ (Colo. App. No. 03CA1034, Jan. 25, 2007).

Plain error is obvious and substantial error that "so undermined the fundamental fairness of the trial itself. . . as to cast serious doubt on the reliability of the judgment of conviction." *Miller, supra,* 113 P.3d at 750 (quoting *People v. Sepulveda,* 65 P.3d 1002, 1006 (Colo. 2003)). "As applied to jury instructions, the defendant must 'demonstrate not only that the instruction affected a substantial right, but also that the record reveals a reasonable possibility that the error contributed to his conviction.'" Miller, *supra,* 113 P.3d at 750 (quoting in part *People v. Garcia,* 28 P.3d 340, 344 (Colo. 2001)).

When reviewing jury instructions for plain error, we must look at the instructions as a whole. *Miller, supra,* 113 P.3d at 751; *Grant, supra,___P.3d* at___. "The trial court has the duty to instruct the jury properly on all matters of law, and the failure to do so with respect to the essential elements of the offense constitutes plain *error." People v. Freeman,* 668 P.2d 1371, 1382 (Colo. 1983); *see also People v. Montoya,* 141 P.3d 916, 920 (Colo. App. 2006). At the same time, however, a trial court's "failure to instruct the jury properly does not constitute plain

error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the *law." Miller, supra,* 113 P.3d at 750.

"Moreover, an erroneous jury instruction does not normally constitute plain error where the issue is not contested at trial or where the record contains overwhelming evidence of the defendant's *guilt." Miller, supra,* 113 P.3d at 750.

3. Threat of Violence

Defendant argues that Instruction No. 11 incorrectly stated that a threat of violence is not protected by the First Amendment. We conclude that the instruction, considered in its entirety, is not erroneous.

In some circumstances, a threat of violence may be protected by the First Amendment. *See Watts, supra,* 394 U.S. at 706-08, 89 S.Ct. at 140 1-02; *Hickman, supra,* 988 P.2d at 639. That protection exists where the threat of violence is, viewed in context, nothing more than "political hyperbole." *Watts, supra,* 394 U.S. at 706-08, 89 S.Ct. at 1401-02; *Hickman, supra,* 988 P.2d at 639; *see also Janousek, supra,* 871 P.2d at 1198 (Mullarkey, J., specially concurring) (threats that are "mere political argument, talk or jest" are protected).

Here, while Instruction No. 11 stated that threats of violence are not protected free speech, it also stated in the next sentence that words "used as mere political argument, or as idle talk or in jest" are not threats. Thus, Instruction No. 11 properly distinguished between threats of violence that are true

threats and those that are not.

4. Speaker's Intent to Threaten

Defendant contends the instructions should have included the "new" element of the offense that the speaker subjectively intended to threaten. We have concluded, however, that the objective standard applies to determine whether a statement is a true threat. Thus, the trial court did not err in failing to instruct the jury that the People were required to prove defendant's subjective intent to threaten.

5. Conclusive Presumption

Defendant argues that because the trial court failed to properly define "threat" in the jury instructions, the instructions compelled the jury to conclusively presume that he intended his statements to threaten. However, this argument also presupposes, erroneously, that the People were required to prove such intent. Further, we do not perceive any conclusive presumption suggested by the instructions. Conclusive presumptions "relieve[] the prosecution of its burden of persuasion by removing the presumed element from the case entirely when the prosecution proves the predicate fact on which the presumption is *based." Jolly v. People,* 742 P.2d 891, 896 (Colo. 1987). Conclusive presumptions violate the due process rights of defendants because they "can reasonably be interpreted by the factfinder as a mandate to find the presumed element of the crime upon proof of the predicate fact, and thus clash[] directly with the presumption of innocence and the constitutional requirement of prosecutorial proof beyond a reasonable *doubt." Jolly, supra,* 742 P.2d at 897; *see also People v. Felgar,* 58 P.3d 1122, 1124 (Colo. App. 2002). "The critical consideration in de-

termining the validity of [the instruction] is whether a reasonable jury could have understood the instruction as relieving the state of its burden of persuasion on an essential element of the *crime." Jolly, supra,* 742 P.2d at 898. The focus of this analysis "must be on the specific language of the instruction *itself." Jolly, supra,* 742 P.2d at 898. Here, the jury instruction defining "threat"– Instruction No. 11 –did not mandate or compel the jury to conclude that the Notices contained "true threats." See *Jolly, supra,* 742 P.2d at 898 (jury instruction established a conclusive presumption where it used language such as "shall"). Rather, it distinguished between such threats and those that are merely political argument, idle talk, or made in jest. Moreover, Instruction No. 10 specifically told the jurors that they could find defendant guilty only if they found that the People proved all elements of the offense beyond a reasonable doubt. Thus, we conclude that a reasonable juror could not have interpreted Instructions Nos. 10 and 11 as relieving the prosecution of its burden of proof as to the element of a threat. *See Montoya, supra,* 141 P.3d at 920-2 1; cf. *People v. Bostic,* 148 P.3d 250, 258-59 (Colo. App. 2006) (instruction that told jurors where illegal drugs were found did not relieve prosecution of its burden of proof).

C. Judge's Oath of Office

Defendant contends that his convictions are void for lack of jurisdiction because Judge Quinn did not preside over his trial under a valid oath of office and was therefore unauthorized to serve as a judge. We disagree.

The People have filed a motion with this court asking us to take judicial notice that Judge Quinn executed a valid oath of office as a senior judge on January 13, 2003 (one and one-half years before defendant's trial), or, in the alternative, to supplement the record to include Judge Quinn's written oath of office and two-year contract of employment as a senior judge, both of which were signed in January 2003. Defendant filed a response opposing the People's motion. The People's motion was deferred to this division. We grant the motion to take judicial notice.

Colorado Rule of Evidence 201 allows a court, "at any stage of the proceeding," to take judicial notice of adjudicative facts, so long as those facts are "not subject to reasonable dispute" and are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." CRE 20 1 (a), (b), (f); *see also Prestige Homes, Inc. v. Legouffe,* 658 P.2d 850, 853 (Colo. 1983) (appellate court may take judicial notice of facts under CRE 201 (f)).

The dates of a public official's term of office are adjudicative facts within the meaning of this rule. *See Larsen v. Archdiocese of Denver,* 631 P.2d 1163, 1164 (Colo. App. 1981) (court may take judicial notice of term of public office); cf. *Lovato v. Johnson,* 617 P.2d 1203, 1204 (Colo. 1980) (court properly took judicial notice that Utah judge was a "magistrate" under Utah law); *People ex rel. Flanders v. Neary,* 113 Colo. 12, 16, 154 P.2d 48, 50 (1944) (supreme court took judicial notice of district

attorney's term of office).
Further, Judge Quinn's written oath of office and contract of employment for January 2003 through January 2005 are public records of an administrative agency, specifically the Office of the State Court Administrator. We may take judicial notice of such records. *See Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (court took judicial notice of state agency's contract with private entity); cf. *Vento v. Colo. Nat'l Bank*, 985 P.2d 48, 52 (Colo. App. 1999) (court may take judicial notice of court's records in related proceeding); *see generally* 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 201.12[13] (2d ed. 2006).

The oath of office and contract Judge Quinn executed show that he was authorized to serve as a senior judge throughout the course of defendant's trial court proceedings. Thus, Judge Quinn was authorized to preside over defendant's trial, and defendant's convictions are not void for lack of jurisdiction. Cf. *People v. Jachnik*, 116 P.3d 1276, 1277-78 (Colo. App. 2005) (county court judge lacked jurisdiction to preside over trial in district court where People failed to identify any order authorizing such action).

Defendant nevertheless argues that the trial court lacked jurisdiction and his convictions are void because, even if Judge Quinn presided under a current and valid oath of office, he failed to file his oath of office with the secretary of state. We disagree.

District court judges are required by art. XII, § 9 of

the Colorado Constitution to "file their oaths of office with the secretary of *state." See also* Chief Justice Directive 85-2 5. Though the People argue that this requirement did not apply to Judge Quinn because he was a "senior" judge rather than a "district court" judge, we will assume that the requirement was applicable to Judge Quinn.

However, even assuming such a filing requirement, when a public officer signs a valid oath of office but misses the deadline for filing the oath with the secretary of state, the officer still possesses the authority to carry out his or her duties as a de facto officer. *People v. Scott,* 116 P.3d 1231, 1232-33 (Colo. App. 2004); *see also Nguyen v. United States,* 539 U.S. 69, 77-78, 123 S.Ct. 2130, 2 135-36, 156 L.Ed.2d 64 (2003) (when a legal deficiency in a judge's appointment is merely technical, a properly appointed judge still acts under valid de facto authority); *Relative Value Studies, Inc. v. McGraw-Hill Cos.,* 981 P.2d 687, 688 (Colo. App. 1999) ("a properly appointed judge, despite even a conceded violation of [a] constitutional. . . requirement, does not lose his or her authority to act as judge merely because of the violation"). Thus, any failure to file Judge Quinn's oath of office with the secretary of state did not deprive the court of jurisdiction.

III. Conclusion

For the foregoing reasons, defendant's judgment of conviction is affirmed.

JUDGE CARPARELLI concurs.

JUDGE VOGT specially concurs.

JUDGE VOGT specially concurring.
I agree with the majority that the judgment of conviction should be affirmed, but I reach that conclusion for reasons other than those relied on by the majority.

In my view, *Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), requires a showing that defendant subjectively intended to make a threat in order for his conviction to pass constitutional muster. Under *Black* as I read it, speech may not be constitutionally punished simply because a reasonable person would understand it as a threat, if the speaker did not mean for the speech to be so understood.

I reach this conclusion based on the *Black* Court's statement that "true threats" encompass "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," and on its statement that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or *death." Black, supra,* 538 U.S. at 359-60, 123 S.Ct. at 1548.

Although the majority suggests that the Court's statement regarding "intimidation" is inapplicable to this case, I believe that the acts of which defendant was convicted may fairly be characterized as intimidation, and I note that, at oral argument here, the People did not disagree with that proposi-

tion.

Further, the holding in *Black* supports the conclusion that the inquiry is subjective rather than objective. It is difficult to conceive of a situation in which an objectively reasonable viewer would not perceive cross burning as a threat; yet the Court struck down, as facially unconstitutional, a statute providing that burning a cross on the property of another, or on public property, was prima facie evidence of intent to intimidate.

I also disagree with the majority's analysis to the extent it suggests that most *post-Black* decisions have continued to apply an objective standard to determine whether speech constitutes a true threat. As the majority correctly points out, since *Black* was decided, only a few courts have directly considered whether *Black* requires proof of the speaker's subjective intent to threaten. One case cited by the majority, *United States v. Cassel,* 408 F.3d 622 (9th Cir. 2005), holds that *Black* requires such subjective intent; *see also United States v. Magleby,* 420 F.3d 1136, 1139 (10th Cir. 2005) (recognizing that *Black* requires "an intent to threaten," but holding that defendant's claim that jury instructions erroneously failed to include such requirement was procedurally barred). Of the five cases that the majority cites as standing for the proposition that subjective intent is not required, only two are published decisions. In the first, *United States v. D'Amario,* 461 F. Supp. 2d 298 (D.N.J. 2006), the issue was whether the prosecution had to prove that the defendant actually intended to carry out his threat. The court correctly recognized that, under *Black,* no such intent was

required; however, that is not the issue presented here. The other published case cited by the majority, *New York ex rel. Spitzer v. Cain,* 418 F. Supp. 2d 457 (S.D.N.Y. 2006), disagreed with the defendants' subjective intent argument, but ultimately concluded that the argument was "irrelevant" because: "Testimony offered at the hearing suffices to establish that defendants' statements were threats under the proposed standard. . . . Under any standard, objective or subjective, . . . the defendants' statements were true threats." Cain, *supra,* 418 F. Supp. 2d at 479-80. Thus, I do not view either *D'Amario* or *Cain* as persuasive authority for adhering to an objective standard.

Although I disagree with the majority's conclusion that, notwithstanding *Black,* speech may be punished without a showing that the speaker subjectively intended to make a threat, I do not believe it is necessary to decide the issue in this case. I am persuaded that the evidence here was sufficient to establish that defendant subjectively intended to threaten the judges, and that his conviction was therefore not unconstitutional.

The jury found beyond a reasonable doubt that defendant acted with the intent to alter or affect the judges' decisions, and its finding was supported by defendant's trial testimony conceding that he sent the notices to the judges with the intent to influence them to "change their mind." This finding alone potentially satisfies the subjective intent requirement of *Black.* After explaining that requirement, the *Black* Court went on to conclude that "Virginia's statute does not run afoul of the First Amendment

insofar as it bans cross burning with intent to intimidate," and that "[a] ban on cross burning carried out with the intent to intimidate is . .. proscribable under the First Amendment." Black, *supra,* 538 U.S. at 363, 123 S.Ct. at 1549-50.

That a finding of specific intent may obviate First Amendment concerns about "true threats" was recognized in *United States v. Stewart,* 420 F.3d 1007 (9th Cir. 2005). After discussing the "tension" between *Black* and its earlier holdings applying an objective "true threat" definition, the *Stewart* court concluded that it need not decide whether the objective or subjective definition should apply because the evidence established that the defendant's statement was a true threat under either definition. In so concluding, the court observed that the statute under which the defendant was convicted contained a specific intent element: it punished only threats against officials made "with the intent to impede, intimidate, interfere with, or retaliate against such officials" on account of their performance of their duties. Thus, the court reasoned,

> [A] conviction under that statute could only be had upon proof that the speaker intended the speech to impede, intimidate, interfere with, or retaliate against the protected official. Such proof would seem to subsume the subjective "true threat" definition announced in *Black.* . .; one cannot have the intent required under [the statute] without also intending to make the threat.

Stewart, supra, 420 F.3d at 1017. Similarly here, it is at least arguable that the specific intent requirement of § 18-8-306 subsumes the subjective "true

threat" intent addressed in *Black*.

However, even if it does not, there was ample additional evidence presented at trial that defendant subjectively intended his notices to the judges to be threats. As the majority points out, the notices expressly threatened the judges with arrest by a militia; they referenced a charge of treason, an offense punishable by death; and they were conveyed directly to the judges, as opposed to being mere "political hyperbole" intended for public consumption. Additionally, defendant testified that he wanted to convey to the judges that, if they did not return his gun and bullets and overturn his conviction, they would be arrested.

He also testified regarding a "preliminary militia alert" that he had sent out to members of his militia. The alert, which was admitted into evidence, is replete with references to the weapons defendant and the militia would use if defendant were to find himself in a standoff with the government ("As long as I am alive and have ammo, and yes I have lots of ammo, I will hold them at bay. . .. Once you take up with force of arms and deploy as an individual or a unit, you are in the game. . . . I will be well armed. ... I hope all of you will come prepared with force of arms.. . ."). Although the "preliminary militia alert" was sent out before defendant sent his notices to the judges and would not itself rise to the level of a true threat, it was relevant to the determination of defendant's subjective intent in sending out the notices.

The evidence thus establishes that, even assuming

subjective intent is required, defendant's notices were "true threats," and, as such, were not protected by the First Amendment. In light of the evidence, I further conclude that the deficiencies in the jury instructions of which defendant complains did not rise to the level of plain error. For these reasons, and because I concur in the majority's resolution of defendant's additional contentions, I agree that the judgment of conviction should be affirmed.

Appendix B

Excerpts from transcript of May 28, 2004 pretrial hearing before Judge Joseph Quinn, District Court, Adams County, Colorado, Case No. 03 CR 2956 and 03 CR 2971, Division G.

...THE COURT: ...Well, with respect to the motions I'm going to address first the motion to dismiss as a matter of law.

In this case Judge Marshall on or about August 26th of 2003 affirmed the judgment of conviction in the Thornton Municipal Court for possessing a dangerous weapon. On or about October 16th the Defendant filed a notice and orders to Judge Marshall and Judge Rose demanding that they overturn his conviction. The notice and order stated that failure to do so will result in a treason charge and a mutual defense pact militia arrest warrant for the judges' arrest. And this will happen unless the Defendant's unconstitutional conviction is overturned, his bond refunded, and property returned.

The Defendant's motion to dismiss as a matter of law argues that Judge Marshall and Judge Rose lacked jurisdiction over the Defendant's appeal at the time the notice and order were filed and hence there was no decision, vote or action to be considered by the judges as required by the statute 18-8-306.

And that statute provides that any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against his person or property with the intent thereby to alter or affect the public servant's decision concerning any matter which is to be consid-

ered or performed by the public servant commits a Class 4 Felony.

Whether or not Judge Marshall and/or Judge Rose had subject matter jurisdiction is not an element of the offense as defined by the statute. Both Judges in this case had jurisdiction to determine the jurisdiction and even if the Judges lacked that subject matter jurisdiction at the time the crime may still be committed when the offender makes a threat of violence or exercises deceit or a threat of economic reprisal in an attempt to influence a Judge to act even in excess of the Judge's jurisdiction on a matter that the offender has filed with the court and that requires some action by the judge.

Under Colorado statute 18-2-101, Subsection 1, factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

Now, in this case so far as the charges are concerned the implicit inference from the charges is that the Defendant obviously believed the Judges had the power to rule on the motions in the order that he had filed with the Judges. Even if the Judges had no jurisdiction the lack of jurisdiction does not constitute a defense.

In addition really what is involved in the Defendant's action is really a matter that involves a motion to reconsider the Judges' prior decision and as alleged in the information this motion to reconsider is made under threat of violence or deceit. The Judge clearly had jurisdiction to determine whether that Judge had jurisdiction and thus had the power to address the motion by ruling that the motion was in excess of jurisdiction or alternatively had the

power to grant the motion whether or not it was in excess of jurisdiction.

In either case either on the basis that legal or factual impossibility is not a defense or on the basis that the Court always had the power to determine whether it has jurisdiction and can act even in excess of jurisdiction the Defendant's motion to dismiss on grounds that as a matter of law the Court had no jurisdiction is denied and is not well taken.

With respect to the motion to dismiss on the grounds that the statute is unconstitutional as applied to the Defendant, I would note that the critical elements are, at least as charged in this case, an attempt to influence a public servant in a decision in which the – in a decision in which the matter before the Judge is to be considered by the Judge in doing so by means of deceit or threat of violence and also with the intent to alter or affect the public servant's decision in the matter. That's basically the charges alleged here.

Now in People v. Janousek at 871 P.2d 1189 the court in that case held that the statute was not unconstitutionally vague and overbroad and would not be overbroad as applied to the defendant. The letter that Janousek wrote in that case was much more vitriolic and contemptuous in a very general sense than the document we're dealing with here. The letter in that case stated that we know you're a crook, you damn bastard, how many other innocents have you screwed, bet you lost count years ago. Does a dork like you think you can get away with murder? You might end up your own victim. Of course I'll make sure you pay for all of the torment you've caused, I wouldn't want you to do it again.

And then it goes on that you must pay up now or

face a much pricier levy as I'll tolerate your crap no longer. One way or another I'll guarantee that you pay, you could make it very expensive for yourself if you insist.

And it goes on and the court finds the tone and language of the letter emits a threatening manner. Clearly from the statute's proscriptions it's not protected by the First Amendment and therefore the statute is constitutional as applied in Janousek.

Here, going to the allegation, the Defendant's notices and order to the Judges demands that the Judges overturn the conviction and return bond money and property, and the failure to do so will result in a treason charge and an arrest warrant, a mutual defense pact militia warrant for both Judges.

The allegation that the Defendant attempted to influence the Judges by means of deceit really involves the representation that the militia warrant would be executed, and that's arguably a form of deceit, and the letters represent the threat of violence in that the threat of forceable arrest and custody would actually take place and be carried out if the conviction was not overturned.

Now enforceable arrest obviously involves violence in that it involves taking one into custody by force if necessary and it comes within the ambit of the statutory element of, "Threat of violence." As I've indicated at the preliminary hearing there is no evidence of any threat of economic reprisal in this case but so far as the charges are concerned the statute is not unconstitutional as applied to Defendant here. So the motions to dismiss as a matter of law and on grounds of unconstitutional applicability are both denied.

Appendix C

SUPREME COURT, STATE OF COLORADO
CASE NO. 07SC575
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CERTIORARI TO THE COURT OF APPEALS, 04CA2164
DISTRICT COURT, ADAMS COUNTY, 03CR2959 & 03CR2971

Petitioner:

RICHARD EUGENE STANLEY a/k/a RICK EUGENE STANLEY

v.

Respondent:

THE PEOPLE OF THE STATE OF COLORADO

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 19, 2007.

(Seal: SUPREME COURT STATE OF COLORADO)

Copies Mailed via the State's Mail Services Division on 11/19/17. MLK

James C. Bull
Bucholtz & Bull, P.C.
5575 DTC Parkway, Ste. 225
Greenwood Village, CO 80111

Clerk of the Combined Court
Adams County Justice Center
1100 Judicial Center Dr.
Brighton, CO 80601

Matthew D. Grove, AAG
Attorney General's Office
Appellate Section

Honorable Joseph R. Quinn
Adams County Justice Center
1100 Judicial Center Dr.
Brighton, CO 80601

Clerk of the Court
Colorado Court of Appeals